
Appeal Board/Agency Shop Developments – 2006

Public Employment Relations Commission

Appeal Board

Don Horowitz
Counsel

The majority representative has a constitutional obligation to provide non-members with an adequate explanation of the basis of representation fees in lieu of dues. This explanation often comes in the form of a three column, line-item, summary of chargeable, non-chargeable and total costs for each expense category. It is based on expenditures incurred during the majority representative's most recently completed fiscal year as verified by an auditor or accountant. Court cases refer to it as a "Hudson" notice as the obligation to provide it stems from *Chicago Teacher's Union v. Hudson*, 475 U.S. 292 (1986).

The *Hudson* notice must be provided to non-members in advance of fee collections and must be recalculated annually. The *Hudson* notice is an important aspect of any agency shop system, but there are other obligations as well. At the end of this digest is a summary of the basic requirements for establishing and administering an agency shop system.

Because agency shop litigation often involves federal constitutional issues, decisions from across the country are often pertinent to public sector agency shop law in New Jersey. Many of the cases last year considered alleged omissions of or defects in *Hudson* notices. All courts applied the same standards to determine whether majority representatives had violated the constitutional rights of fee payers. In many cases, the defects were cured during the litigation and the courts weighed what impact those corrective actions had on the amount of damages to be awarded.

New Jersey

Pretlow v. Cumberland Cty. Bd. of Social Services and UAW Local 2327, 2005 U.S. Dist. LEXIS 35547 (D.N.J. 2005)

Eight non-member employees who successfully challenged the adequacy of the *Hudson* notice provided by the UAW, were entitled to limited attorneys' fees. Plaintiffs had claimed that: (1) the breakdown of

chargeable versus non-chargeable expenses was flawed because it was a legal conclusion not verified by an independent auditor; (2) the notices improperly limited the scope of an objector's challenge; and (3) requiring objectors to state the basis for a claim discouraged nonmembers from exercising their First Amendment rights. This decision was preceded by a decision on summary judgment upholding only the third claim and dismissing the other two. The Court ordered that the UAW refund all agency shop fees paid by the plaintiffs for the period covered by the notice and \$1.00 each in nominal damages for the constitutional violation.

State of New Jersey, P.E.R.C. No. 2006-2, 31 NJPER 236 (¶90 2005)

State of New Jersey, P.E.R.C. No. 2006-26, 31 NJPER 325 (¶130 2005)

State of New Jersey, P.E.R.C. No. 2006-49, 32 NJPER 10 (¶4 2006)

These decisions involved a change in the majority representative. They discuss the adequacy of the *Hudson* notice and the need to implement a demand and return system before a new majority representative collects fees. They are addressed in the *Recent Commission Case Law & Policy Developments-2006* paper prepared by Ira Mintz.

Other Public Sector

Locke v. Karass, 382 F. Supp. 2d 181 (D. ME 2005)

Non-member state workers filed a federal civil rights suit (42 U.S.C. §1983) against the State and the Maine State Employees Association to enjoin the collection of service fees. The suit attacked the sufficiency of the *Hudson* notice and the accuracy of the fee calculations. The original notice, relying on the expenditures of the Association and its national affiliate, the Service Employees International Union, set the applicable fee at 73.8 per cent of regular dues. The union issued corrected notices excluding expenses first listed as chargeable and reset the fee at 50 per cent of dues. The Court held that the revision mooted the challenges to the adequacy of the notice and denied injunctive relief on other issues that were not moot.

Brannian, v. City of San Diego and San Diego Municipal Employees Association, 364 F. Supp. 2d 1187 (S.D.CA. 2005)

In another case partially mooted by corrective action, the Court awarded each non-member plaintiff nominal damages in the amount of \$2.00 for violations of First Amendment rights and the federal civil rights

act. Prior to a 2004 change in the collective bargaining agreement, only Association members or non-members who agreed to pay a voluntary agency shop fee could participate in a flexible spending plan that allowed pre-tax dollars to be used for health and life insurance and dental and optical care. The plaintiffs alleged that the arrangement coerced them into joining the Association to get those benefits and thus violated their rights under the First Amendment and the federal civil rights statute. The District Court granted summary judgment to the plaintiff but found no actual injury. It reserved a ruling on attorneys' fees.

***Knox v. Wesley*, 2005 U.S. Dist. LEXIS 29362 (E.D.CA. 2005)**

On June 30, 2005, the California State Employees Association provided non-members with a *Hudson* notice showing its projected expenditures for the upcoming year, based on its audited expense figures from the prior year. In August, the union approved a special assessment that increased the dues of members and the fees of non-members by 25 per cent. The union announced that the assessment would be used to create a "Political Fight Back Fund" to defeat ballot initiatives. Non-member employees filed suit

seeking temporary and preliminary restraints against the collection of the special assessment. They argued the June *Hudson* notice was deficient because it did not account for the assessment and asserted that use of their fees for political purposes would violate their First Amendment rights and constitute irreparable harm. The Court disagreed that the June notice had to anticipate the special assessment. It also held that the union did not have to issue a revised notice when it decided to make the assessment. Noting that the union asserted that some of the fund would be used for chargeable activities, it held that the plaintiffs had not met the required showing to obtain injunctive relief.

***Liegmann v. California Teachers' Association*, 2005 U.S. Dist. LEXIS 27036 (N.D.CA. 2005)**

A group of members and non-members represented by the California Teachers' Association sought injunctive relief, raising the same issues as in *Knox v. Wesley*. With respect to plaintiffs who were members, the Court noted that they have the option of resigning from the Association and becoming non-members. The court held that, as in *Knox v. Wesley*, the non-members had

not established that they would suffer immediate irreparable harm and denied their TRO application.

***Cummings v. Connell*, 2005 U.S. App. LEXIS 8691 (9th Cir. 2005)**

The Court of Appeals amended its earlier decision (402 F. 3d. 396) in this seven year agency shop dispute involving a class of 37,000 non-member employees who pay fair share fees to unions representing state bargaining units. The Court reversed a District Court ruling that had awarded nominal damages of \$1.00 only to the named plaintiffs. The appeals court held that all members of the class were entitled to the damage award. In a 2003 decision (316 F.3d 886), the Court of Appeals held that state unions had failed to comply with *Hudson*. But it reversed as over-broad a million-dollar award of restitution of the non-chargeable portion of the fee to all class members. During the litigation, the unions issued new *Hudson* notices and afforded non-members another opportunity to appeal the fees.

***Esquinance v. Polk County Education Association* 2005 Tenn. App. LEXIS 446, 178 L.R.R.M. 2419 (Tenn. Ct. Apps. 2005)**

The Tennessee court, construing the definition of “professional employee

organization” in the state’s teacher negotiations statute, held that a teacher has a state constitutional right to join the Association. Because Tennessee is a “right to work” state, an agency shop agreement would be illegal. The plaintiff, an Association member, had requested that the Association use his dues for local collective negotiations only and not collect the portion of his membership dues that is paid to its state and national affiliates. He also objected to use of his funds for political purposes to support abortion and homosexual rights, affirmative action, gun control, increased taxation and the election of a Democrat as President or to oppose HIV testing of school employees, support for military weapons systems, teacher competency testing, English as the official language and the election of a Republican as President.

The Association refused the request for a partial dues refund and the teacher filed a suit that the trial court dismissed. On appeal the court held that the teacher’s claimed constitutional right not to have his Association dues used for political and ideological purposes to which he objects, stated a cognizable claim. The case was remanded for trial.

***State ex rel. Wash. State Pub. Disclosure Comm'n v. Washington State Education Association* 2006 Wash. LEXIS 260 (Wash. 2006)**

An appeals court had held unconstitutional a statute providing that agency shop fees could not be used for political purposes, “unless affirmatively authorized by the individual.” The demand and return system used by Washington state affiliates of the NEA provided for refunds of non-chargeable expenses only where the non-member filed a request or objection. Otherwise the agency shop fee was equal to membership dues. The Associations argued to the Washington Supreme Court that the law conflicted with a principle established by federal court decisions that objections to non-chargeable expenses should not be presumed and was thus unconstitutional. By a 6-3 vote the Court agreed.

NOTE: contrast *NJEA v. PERC and PERC Appeal Board*, 266 N.J. Super. 66 (App. Div. 1993), certif. den. 134 N.J. 569 (1993).

Private Sector

***Studio Transp. Drivers Local 399*, 2006 NLRB LEXIS 27, 346 N.L.R.B. No. 32 (Jan. 26, 2006)**

Prior to the relevant dues period, the union collected liquidated damages from various employers. It advised agency shop fee payers that it would use the damage awards to cover the cost of expenditures that were not chargeable to non-members. The union’s audited calculations showed that 98.8 per cent of expenditures were germane to collective bargaining and contract administration and thus chargeable. After the money from the damage awards was allocated, the non-member fee was raised to 99.6 per cent of dues. The Administrative Law Judge, citing *Teamsters Local 618 (Chevron Chemical Co.)*, 326 NLRB 301, 302 (1998), held that the majority representative had violated 29 U.S.C. § 158(b)(1)(A) and ordered it to reduce the fee of the objector who had filed the charge. The Board rejected the union’s exceptions and adopted the ALJ’s decision.

AGENCY SHOP ABCs¹

These are the initial steps required to establish and administer a valid agency shop agreement. In addition to the pertinent statutes and regulations, (*N.J.S.A.* 34:13A-5.5 through 5.9 and *N.J.A.C.* 19:17-1.1 *et seq.*), federal and state court decisions affect how an agency shop system must be administered.²

A. Authorization to collect fees. *N.J.S.A.* 34:13A-5.5(a) provides two ways a majority representative can secure the right to receive representation fees in lieu of dues from nonmembers in its negotiating unit.³

¹Access Appeal Board information via the internet at http://www.state.nj.us/perc/html/perc_appeal_board.html

²Pertinent cases include: *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991); *Chicago Teacher's Union v. Hudson*, 475 U.S. 292 (1986); *Boonton Bd. of Ed. v. Kramer*, 99 N.J. 523 (1985), cert. den. 106 S. Ct. 1388 (1986); *NJEA v. PERC and PERC Appeal Board* 266 N.J. Super. 66 (App. Div. 1993), certif. den. 134 N.J. 569 (1993)

³*N.J.S.A.* 34:13A-5.5(b) provides that to be eligible to collect representation fees, a majority representative must ensure that "membership on an equal basis" is

1. Collective negotiations with the public employer producing a written agreement authorizing the deduction of a representation fee in lieu of dues from the salaries of non-members.

2. If collective negotiations do not result in an agreement, the majority representative may petition the Public Employment Relations Commission for an order allowing the majority representative to collect representation fees in lieu of dues.⁴

Before such an order is issued, the Commission investigates to determine if:

a. A majority of employees in the unit represented by the petitioner are voluntary dues paying members of that organization;

and

available to all employees in the unit it represents. See *Bergen Cty. and Bergen Cty. Sheriff's Dept. and PBA Loc. No. 134 and Neely*, P.E.R.C. No. 88-9, 13 NJPER 645 (¶18243 1987), aff'd 227 N.J. Super. 1 (1988), certif. den. 111 N.J. 591 (1988).

⁴The validity of this method was upheld in *Hunterdon Cty. and CWA Local 1034*, 369 N.J. Super. 572 (App. Div. 2004), certif. den. 182 N.J. 139 (2004).

b. The petitioner maintains a demand and return system required by *N.J.S.A. 34:13A-5.5(c)*. (See below).

If these conditions are met, the Commission will order agency shop fees to be collected through payroll deductions.

B. Amount of the Fee

The fee must not exceed 85 percent of the union's dues, initiation fees and assessments. Adoption of an 85 percent fee does not guarantee that the fee is proper. The maximum allowable fee is 85 percent even if union expenses on non-chargeable items are less than 15 percent of its budget. *N.J.S.A. 34:13A-5.5(b)*.

C. The procedures required to protect the constitutional and statutory rights of fee payers and to handle fee challenges.

The majority representative must first adopt and implement a "demand and return system" with these features:

(1) An annual notice to each fee payer containing:

(a) An explanation of the majority representative's expenditures for its prior fiscal year, showing chargeable and non-chargeable expenditures.

(b) A copy of demand and return system including instructions as to how to use it.

(c) Escrow account information.

(d) The amount of the fee and the method used to calculate it.

(2) The demand and return system must allow at least 30 days after receipt of the Notice for fee payers to challenge the fee.

NO FEES CAN BE COLLECTED UNTIL THIS PERIOD EXPIRES.

(3) The demand and return system must provide "full and fair" proceedings for fee payers who seek review of the fees with a right of appeal to the Appeal Board. At all stages of review proceedings, the burden of proof is on the majority representative.